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In the Supreme Court of the United States

OCTOBER TERM, 1982

WALKER DIE CASTING, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that the filing of a decertification petition when petitioner was engaging in unfair labor practices did not justify petitioner's refusal to bargain with the Union.

2. Whether substantial evidence supports the finding that petitioner's unlawful refusal to bargain with the Union prolonged the strike, thereby converting it to an unfair labor practice strike.

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Statute:

National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.* :

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A65-A69) is reported at 682 F.2d 592. The Board's decision and order (Pet. App. A1-A61) are reported at 255 N.L.R.B. 212.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1982. A petition for rehearing was denied on November 29, 1982. The petition for a writ of certiorari was filed on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 158(a), 159(a) and (c), are reproduced at Pet. 2-3.

STATEMENT

1. On August 18, 1979, petitioner's production and maintenance employees struck in dissatisfaction with the progress of bargaining negotiations for a new contract.[1] On August 27, petitioner wrote to the Union[2] withdrawing the final contract proposal which it had made just before the strike began (Pet. App. A13, A45-A46).

Shortly after the strike began, petitioner started to keep the Union's meetings under surveillance (Pet. App. A27-A28). Around September 1, petitioner's president informed employee Wendell Pigg that petitioner wanted to "get rid" of the Union (*id.* at A22). On September 5, petitioner discharged eleven striking probationary employees (*id.* at A30-A31). On the same day petitioner unilaterally raised the minimum starting wage rate above what it had offered during negotiations (*id.* at A47-A50).

On September 6, 1979, a decertification petition was filed with the Board (Pet. App. A14 n.3), and on September 7, the Union submitted a new contract proposal to petitioner (*id.* at A14). On September 11, however, petitioner notified the Union that no further meeting could be scheduled until the matter of the decertification petition had been resolved (*id.* at A50). At no time thereafter did petitioner offer to reopen negotiations with the Union. In fact, petitioner's president subsequently informed employees that petitioner would set up an employee committee to handle grievances, and such a committee was implemented in the spring of 1980 (*id.* at A41-A45).

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[1]Two days prior to the strike, on August 16, petitioner had advised its employees by memo that it planned to continue operations in the event of a strike, and suggested that employee union members "may want to resign from Union membership before crossing the picket line" (Pet. App. A18).

[2]Local 259, Stove, Furnace, and Allied Appliance Workers' International Union of North America, AFL-CIO.

During the course of the strike, petitioner also threatened to shut the door of the plant rather than continue to deal with the Union president (Pet. App. A24); offered wage increases to induce its employees to break the strike and return to work (*id.* at A23); told employees that, if it had to reinstate everybody in the Union, it was in no hurry to resume negotiations (*id.* at A23-A24); told an employee that by returning to work after engaging in a strike she had lost her seniority status (*id.* at A25); informed employees that they would not be considered for employment until after the decertification election (*id.* at A25-A26);[3] removed employees' picket signs (*id.* at A26-A27); advised employees to resign from the Union (*id.* at A18); and told employees that they would have a good place to work once the Union was defeated (*id.* at A29). In addition, petitioner refused to reinstate and then discharged one employee (Becquet) because she was a union "ringleader" (*id.* at A32-A39).

2. The Board found that petitioner had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by making threats to employees during the course of the strike, by soliciting employees to cease supporting the strike, and by keeping union activities under surveillance (Pet. App. A20-A30, A52-A53). The Board also found that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging its probationary employees; by refusing to reinstate employee Becquet on September 12; by refusing to reinstate her on September 24 without loss of seniority privileges; and by discharging her on November 16 because of her union activities (Pet. App. A30-A40, A53).

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[3]An election was held on October 19, 1979, which the Union lost by a vote of 70 to 58, with 36 ballots challenged. Union objections were filed on October 26; a hearing was held, but the Regional Director dismissed the decertification petition because of this unfair labor practice proceeding. The Board denied petitioner's request for review without prejudice to the petition being reinstated, depending on the outcome of this proceeding (Pet. App. A14 n.3).

The Board further found that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally changing wages and other conditions of employment, advising employees to resign from the Union, withdrawing its last contract proposal, and refusing to negotiate with the Union since September 11, 1979 (Pet. App. A45-A51, A53). In finding that petitioner unlawfully refused to bargain after the decertification petition was filed, the administrative law judge, whose decision in this regard was adopted by the Board, explained (Pet. App. A50; footnote omitted): "The law is clear that the filing of a decertification petition is not sufficient basis to justify an employer's refusal to bargain when, as here, the [employer's] action occurred in context with unlawful conduct."

Finally, the Board found that the economic strike was converted to an unfair labor practice strike on August 27, 1979, when petitioner withdrew its final offer and thereby "seriously impeded the success of the negotiations and thus prolonged the strike" (Pet. App. A52). Petitioner therefore violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offers to return to work (Pet. App. A53).[4]

3. The court of appeals upheld the Board's unfair labor practice findings, except for the findings that the August 16th notice (that employees could resign from the Union) and petitioner's August 27 withdrawal of its final contract offer violated the Act (Pet. App. A68).[5]

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[4]Petitioner did not except to the administrative law judge's finding that its conduct in establishing an employee grievance committee violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2) (Pet. App. A53). That portion of the Board's decision was thus not contested in the court of appeals.

[5]The court stated that " 'an employer has a right to withdraw proposals made before a strike to reflect the changed economic background' " (Pet. App. A68, quoting *Pease Co.* v. *NLRB*, 666 F.2d 1044 (6th Cir.

The court agreed with the Board that petitioner's refusal to bargain with the Union on September 11, 1979 was a violation of Section 8(a)(5) and (1) of the Act. Finding that this refusal to bargain "obviously prolonged the strike," the court concluded that petitioner's unlawful conduct converted the economic strike into an unfair labor practice strike on September 11 rather than on August 27, as the Board had found (Pet. App. A69). The court stated (*ibid.*):

> "the mere filing of a decertification petition is of itself insufficient justification" to support such a refusal. *Rogers Manufacturing Co.*, [486 F.2d 644, 647 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974)]. Rather, the employer must advance "evidence indicating that a good faith doubt was reasonably grounded." *Id.* The Company in the instant case failed to introduce such evidence. Moreover, by September 11, 1979 the Company had undertaken to engage in other unfair labor practices, including unilaterally raising starting wages and firing striking probationary employees. These actions on the part of the Company "cast a shadow on its allegations of good faith." *Id.*

ARGUMENT

Petitioner, relying on *Telautograph Corp.*, 199 N.L.R.B. 892 (1972), contends (Pet. 6-10) that it was entitled to suspend bargaining with the Union because of the filing of the decertification petition. Petitioner further contends that the contrary position of the Board, upheld by the court of appeals, conflicts with *Telautograph* and with the decisions of courts of appeals that have upheld that rule. There is no merit to this contention.

1981), cert. denied, No. 81-1710 (May 17, 1982)). The court found that the August 16 notice contained " 'no threat of reprisal or force or promise of benefit' " (Pet. App. A68 n.3). No issue concerning the propriety of these findings is raised here.

In *Telautograph* the Board held that, where a decertification petition has been filed and there is no evidence of previous unfair labor practices which may have caused decline in union support, the employer must discontinue bargaining with the union until after the question of representation has been settled by the Board.[6] That rule is inapplicable here since petitioner committed unfair labor practices which may have caused a decline in support for the Union.

The cases cited by petitioner (Pet. 10) are not to the contrary. In *Sahara-Tahoe Corp.* v. *NLRB*, 648 F.2d 553 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981), the court noted the Board's position in *Telautograph* "that where a decertification petition is timely filed by employees and there is no evidence of unfair labor practices that may have induced a decline in union support, the employer must discontinue bargaining with the incumbent union until the question of representation has been settled by the Board" (648 F.2d at 556; footnote omitted). However, there the court agreed with the Board that the invalid decertification petition did not justify the employer's refusal to bargain (*id.* at 557). *J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850 (5th Cir.), cert. denied, 439 U.S. 893 (1978), involved a refusal to bargain based not on the filing of a decertification petition, but on other grounds which the court found to be insufficient. The court stated that "[t]he kind of 'objective evidence' ordinarily sufficient to overcome a rebuttable presumption of majority support would be greater than fifty percent employee support for a decertification petition, or thirty percent support for decertification combined with other indicia of non-support" (571 F.2d at 859; citation

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[6]In *Dresser Industries*, 264 N.L.R.B. No. 145 (Sept. 30, 1982), slip op. 3-6, the Board overruled *Telautograph* and held that the filing of a decertification petition would not permit an employer to suspend bargaining with an incumbent union. However, the Board held that the rule adopted in *Dresser* would be applied prospectively (slip op. 6). It was not applied here by the Board or by the court of appeals.

omitted). And in *National Cash Register Co.* v. *NLRB*, 494 F.2d 189, 195 (8th Cir. 1974), the court, in allowing reliance on the decertification petition, expressly found that the employer had not committed unfair labor practices which "contributed * * * to the possible loss of majority status by the Union."

Here the Board and the court of appeals found that the decertification petition was filed in a context of unfair labor practices which would tend to undermine the Union's strength.[7] In these circumstances there is no occasion for the application of the *Telautograph* rule.[8]

2. Petitioner also contends (Pet. 10-12) the court of appeals erred in concluding that the strike was converted to an unfair labor strike merely because petitioner had committed unfair labor practices, without finding that petitioner's unlawful conduct prolonged the strike. However, the court did find that the suspension of bargaining "obviously prolonged the strike, thereby converting it into an unfair labor practice strike on September 11, 1979" (Pet. App. A69). That finding is plainly correct, and in accord with settled principles. See *NLRB* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768, 772 (9th Cir. 1965); *Allied Industrial Workers* v. *NLRB*, 476 F.2d 868, 882-883 (D.C. Cir. 1973). Here, the origin of the strike was the inability of petitioner and the Union to reach agreement on a new contract. In

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[7]Petitioner does not dispute that it committed the unfair labor practices found by the Board and upheld by the court of appeals.

[8]While the court of appeals did assert that the filing of a decertification petition was insufficient standing alone to justify a refusal to bargain, it also relied on the fact that petitioner engaged in contemporaneous unfair labor practices. See *Rogers Manufacturing Co.* v. *NLRB*, 486 F.2d 644, 647 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974).

these circumstances, it is reasonable to infer that suspension of negotiations, which precluded any opportunity for the parties to attempt to reach agreement, prolonged the dispute.[9] In any event, whether the court of appeals properly concluded that substantial evidence supported the Board's decision on this issue is a factual question that does not warrant review by this Court.

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[9]Contrary to petitioner's contention (Pet. 11), it is not necessary to find that a strike is "*primarily*" due to unfair labor practices, or that "such practices *actually were considered by* the employees in their decision to strike or to continue" striking, to conclude that a strike was converted to an unfair labor practice strike. *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055 (1st Cir. 1981) (Pet. 11), does not so hold. There the court stated that the issue was: "Was the unfair labor practice a proximate cause of the lengthening of the strike?" (652 F.2d at 1080). In making the assessment (*ibid.*; citations omitted):

> it need not be shown that the employer's unfair labor practice was "the sole or even the major cause or aggravating factor of the strike," but only that it was "*a contributing factor.*" The new issue injected into the bargaining process by the employer's violation "need not be the sole cause for failure to agree."
>
> Both objective and subjective factors may be probative of conversion. Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. Did they continue to view the strike as economic or did their focus shift to protesting the employer's unlawful conduct? However, in examining the union's characterization of the purpose of the strike, the Board and court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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